

NO. 68158-3-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY M. KINZLE,

Appellant.

RECEIVED  
COURT OF APPEALS  
DIVISION I  
MAY 11 11:32 AM '01

---

BRIEF OF RESPONDENT

---

MARK K. ROE  
Prosecuting Attorney

JOHN J. JUHL  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

**TABLE OF CONTENTS**

I. ISSUES ..... 1

II. STATEMENT OF THE CASE ..... 2

    A. FACTS OF THE CRIME..... 2

    B. PROCEDURAL FACTS. .... 5

III. ARGUMENT ..... 8

    A. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING  
DEFENDANT’S MOTION FOR SUBSTITUTION OF COUNSEL.... 8

        1. Defendant’ Motion For Substitution Of Counsel. .... 10

        2. Prosecutor’s Motion To Clarify Whether A Conflict Existed. .... 12

    B. THE COURT DID NOT ABUSE ITS DISCRETION IN  
DETERMINING AS A THRESHOLD QUESTION THAT THERE  
WAS NO REASON TO DOUBT DEFENDANT’S COMPETENCY.  
..... 15

    C. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL  
TRIER OF FACT TO FIND THE ELEMENT OF FORCIBLE  
COMPULSION BEYOND A REASONABLE DOUBT..... 19

        1. Legal Standards. .... 19

        2. Indecent Liberties. .... 21

        3. Definition Of Forcible Compulsion. .... 22

    D. DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH  
THAT THE PROSECUTOR’S CONDUCT WAS IMPROPER OR  
PREJUDICIAL AND THAT ANY PREJUDICIAL EFFECT HAD A  
SUBSTANTIAL LIKELIHOOD OF AFFECTING THE VERDICT  
AND WAS NOT CURED BY THE COURT’S INSTRUCTIONS..... 23

    E. INDETERMINATE SENTENCING SUBJECTING DEFENDANT  
TO LIFETIME SUPERVISION AS A NON PERSISTENT SEX  
OFFENDER IS CONSTITUTIONAL..... 29

    F. SEVEN OF THE CONDITIONS OF COMMUNITY CUSTODY  
WERE IMPROPER OR NOT CRIME RELATED AND THOSE  
CONDITIONS SHOULD BE REMANDED FOR RESENTENCING.  
..... 34

        1. Condition 8. .... 35

2. Condition 10. .... 36  
3. Conditions 15, 16 And 17. .... 36  
4. Conditions 23 And 24. .... 36  
IV. CONCLUSION ..... 37

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>City of Seattle v. Gordon</u> , 39 Wn. App. 437, 693 P.2d 741, 743 (1985) <u>review denied</u> , 103 Wn.2d 1031 (1985) .....	16, 17, 18, 19
<u>In re Personal Restraint of Stenson</u> , 142 Wn.2d 710, 16 P.3d 1 (2001).....	9, 10, 11
<u>Slattery v. City of Seattle</u> , 169 Wn. 144, 13 P.2d 464 (1932) ..	26, 27
<u>State v. Alvarez</u> , 128 Wn.2d 1, 904 P.2d 754 (1995) .....	19
<u>State v. Atterton</u> , 81 Wn. App. 470, 915 P.2d 535 (1996) .....	19
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2010) .....	35, 36
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988) .....	24
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006) .....	20
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997) .....	24, 27
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990) .....	21
<u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956).....	26
<u>State v. Clarke</u> , 156 Wn. 2d 880, 134 P.3d 188, 191 (2006) ...	30, 33
<u>State v. Crenshaw</u> , 27 Wn. App. 326, 617 P.2d 1041 (1980).....	17
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	20, 21
<u>State v. DeWeese</u> , 117 Wn.2d 369, 816 P.2d 1 (1991).....	8, 9
<u>State v. Dhaliwal</u> , 150 Wn.2d 559, 79 P.3d 432 (2003).....	12, 13
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653, 662 (2012) ...	24, 25, 26, 27, 28
<u>State v. Evans</u> , 96 Wn.2d 1, 633 P.2d 83 (1981) .....	27, 28
<u>State v. Fain</u> , 94 Wn.2d 387, 617 P.2d 720 (1980) .....	30, 31, 32
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	27, 28
<u>State v. Flores</u> , 114 Wn. App. 218, 56 P.3d 622, 624 (2002) .	30, 33, 34
<u>State v. Galisa</u> , 63 Wn. App. 833, 822 P.2d 303 (1992).....	20
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	24
<u>State v. Gimarelli</u> , 105 Wn. App. 370, 20 P.3d 430 (2001) 31, 32, 33	
<u>State v. Goodman</u> , 150 Wn.2d 774, 83 P.3d 410 (2004).....	20
<u>State v. Guizzotti</u> , 60 Wn. App. 289, 803 P.2d 808, <u>review denied</u> , 116 Wn.2d 1026, 812 P.2d 102 (1991).....	28
<u>State v. Harvey</u> , 34 Wn. App. 737, 664 P.2d 1281, <u>review denied</u> , 100 Wn.2d 1008 (1983).....	27
<u>State v. Hosier</u> , 157 Wn.2d 1, 133 P.3d 936 (2006) .....	20
<u>State v. Huber</u> , 129 Wn. App. 499, 119 P.3d 388 (2005) .....	28
<u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005) .....	20
<u>State v. Jackson</u> , 62 Wn. App. 53, 813 P.2d 156 (1991).....	20
<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003) .....	35

<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991), <u>cert. denied</u> , 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).....	18
<u>State v. McKeown</u> , 23 Wn. App. 582, 596 P.2d 1100 (1979) .....	20
<u>State v. McKnight</u> , 54 Wn. App. 521, 774 P.2d 532 (1989) .....	22
<u>State v. Morin</u> , 100 Wn. App. 25, 995 P.2d 113, <u>review denied</u> , 142 Wn.2d 1010, 16 P.3d 1264 (2000) .....	30, 32, 33
<u>State v. Randecker</u> , 79 Wn.2d 512, 487 P.2d 1295 (1971) .....	20
<u>State v. Regan</u> , 143 Wn. App. 419, 177 P.3d 783 <u>review denied</u> , 165 Wn.2d 1012 (2008).....	12, 13, 14
<u>State v. Rehak</u> , 67 Wn. App. 157, 834 P.2d 651 (1992) <u>review</u> <u>denied</u> , 120 Wn.2d 1022, 844 P.2d 1018 (1993).....	9
<u>State v. Rice</u> , 120 Wn.2d 549, 844 P.2d 416 (1993) .....	28
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993) .....	35
<u>State v. Ritola</u> , 63 Wn. App. 252, 817 P.2d 1390 (1991).....	22
<u>State v. Rivers</u> , 129 Wn.2d 697, 921 P.2d 495 (1996) .....	34
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	20
<u>State v. Stein</u> , 144 Wn.2d 236, 27 P.3d 184 (2001) .....	29
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <u>cert.</u> <u>denied</u> , 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998)9, 11, 27	
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990) .....	25
<u>State v. Thorgerson</u> , 172 Wn.2d 438, 258 P.3d 43 (2011) .....	26
<u>State v. Valladares</u> , 99 Wn.2d 663, 664 P.2d 508, 513 (1983).....	15
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	9, 10, 11, 12
<u>State v. Vicuna</u> , 119 Wn. App. 26, 79 P.3d 1 (2003), <u>review denied</u> , 152 Wn.2d 1008 (2004).....	13
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	21
<u>State v. Walton</u> , 76 Wn. App. 364, 884 P.2d 1348, 1352 (1994)..	15, 21
<u>State v. Weber</u> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	25
<u>State v. Wicklund</u> , 96 Wn.2d 798, 638 P.2d 1241 (1982).....	16
<u>State v. Yates</u> , 161 Wn.2d 714, 168 P.3d 359 (2007) .....	27

#### **FEDERAL CASES**

<u>Cuyler v. Sullivan</u> , 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).....	13
<u>Mickens v. Taylor</u> , 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002).....	13
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	12
<u>United States v. Baker</u> , 256 F.3d 855 (9th Cir.2001).....	13
<u>United States v. Moore</u> , 159 F.3d 1154 (9th Cir.1998) .....	10

<u>United States v. Stantini</u> , 85 F.3d 9 (2d Cir.1996) .....	14
<u>Wheat v. United States</u> , 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) .....	8

**U.S. CONSTITUTIONAL PROVISIONS**

Sixth Amendment .....	8, 12, 15
-----------------------	-----------

**WASHINGTON STATUTES**

LAWS OF 2001, 2d Spec. Sess., ch. 12, § 303.....	32
RCW 10.77.010(6) .....	16, 17
RCW 10.77.050 .....	16
RCW 10.77.060 .....	16, 17
RCW 10.77.060(1) .....	16
RCW 71.09.020(17) .....	31
RCW 9.94A.030(10) .....	35
RCW 9.94A.030(32)(h).....	31
RCW 9.94A.507 .....	30, 31, 32, 34
RCW 9.94A.507(1)(a)(i).....	29
RCW 9.94A.507(3) .....	30
RCW 9.94A.703(3)(c).....	35
RCW 9.94A.703(3)(d).....	35
RCW 9.94A.703(3)(f).....	35
RCW 9.94A.712 .....	32
RCW 9A.20.021 .....	29, 30
RCW 9A.20.021(1)(a).....	29, 30
RCW 9A.44.010(6) .....	22
RCW 9A.44.100 .....	21, 33
RCW 9A.44.100(2)(b).....	29

**OTHER AUTHORITIES**

2001 FINAL LEGISLATIVE REPORT, 57th Wash. Leg., at 233....	33
C.Code Ann. § 17-25-45(a) (1985 and Supp.2001).....	33
Ga.Code Ann. § 17-10-7(b)(2) (1997) .....	33
Mont.Code Ann. § 46-18-219(1)(a) (2001) .....	33
N.M. Stat. Ann. § 31-18-25 (2002) .....	33
WPIC 1.02 .....	28, 29
WPIC 45.03 .....	22
WPIC 49.02 .....	21

## **I. ISSUES**

1. Did the court abuse its discretion in denying defendant's motion for new appointed counsel when defendant did not show an irreconcilable conflict, a complete breakdown in communication, or a conflict of interest?

2. Did the trial court abuse its discretion in determining as a threshold question that there was no reason to doubt defendant's competency?

3. Evidence established that on March 13, 2011, defendant grabbed victim from behind, pulled her up against him, began grabbing her breast and buttocks, pulling at her clothes and kissing her on the neck. Defendant tore victim's bra during the attack. Defendant was rubbing himself against victim and she could feel that he had an erection. Victim yelled and struggled to get away from defendant. When she finally pushed him away defendant ran from the store. Victim had never seen defendant before. Was the evidence sufficient for a rational trier of fact to find the essential elements of indecent liberties by forcible compulsion beyond a reasonable doubt?

4. In challenging statements made by the prosecutor in closing argument the defendant bears the burden to establish that

the prosecutor's conduct was both improper and prejudicial. Additionally, when a defendant does not object to the prosecutor's comment at trial he must show that no curative instruction would have obviated any prejudicial effect and that the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. a) Has defendant established that the prosecutor's conduct was both improper and prejudicial? b) Has defendant established that any prejudicial effect had a substantial likelihood of affecting the verdict and that any prejudice was not cured by the court's instructions?

5. Is defendant's indeterminate sentence which subjects him to lifetime supervision as a non persistent offender convicted of a specified sex crime unconstitutional?

6. The State concedes that seven of the conditions of community custody were improper or not crime related. Should the portion of defendant's sentence addressing those seven community custody conditions be reversed and remand for resentencing?

## **II. STATEMENT OF THE CASE**

### **A. FACTS OF THE CRIME.**

In March 2011, defendant, Jeffrey Michael Kinzle, lived on Main Street, Monroe, WA. During the late afternoon on March 13,

2011, defendant and two of his roommates, Nathan Wood and Michael Flavin, drank a fifth of cheap whiskey and talked about how to get girls. After they had each consumed about a third of the bottle of whiskey, defendant and Wood left to go to the store. About 45 minutes later defendant returned without Wood claiming that Wood “grabbed some woman’s ass at the store.” Defendant took off his jacket and hat, shaved and put on a sweater. 11/1/11 RP 98-101, 120; 11/2/11 RP 5-12. 15-17.<sup>1</sup>

On March 13, 2011, L.<sup>2</sup> was working the 3:00 to 10:00 p.m. shift at a store on Main Street, Monroe, WA. Around 6:00 p.m. two men whom L. had never seen before entered the store. She was the only person in the store at the time. One man, later identified as defendant, had brown hair, blue eyes, a light beard, wearing a hat, blue pants, brown shoes, jacket, and red sweater. The other man, later identified as Wood, was wearing glasses with lighter hair. Defendant asked L. to show him where the jalapenos were located. While L. was leading him down the aisle, defendant touched her on the buttocks. L. asked him what’s going on and

---

<sup>1</sup> For consistency Respondent’s Brief uses the same notations for the record of proceedings as those used in Appellant’s Brief.

<sup>2</sup> L. is referred to by an initial to protect her identity as a victim of sexual assault.

defendant just laughed. L. told defendant to pay and leave the store. While paying for the jalapenos defendant asked L. if she would like to feel his penis. She replied, no. 11/1/11 RP 18-26, 101, 112.

Wood asked L. to show him the chipotle peppers. While showing Wood where the peppers were located defendant attacked L., grabbing her from behind, holding her by force up against him, and pulling her to the canned food section of the store. Defendant had one hand around L.'s waist and was grabbing and pulling with his other hand. While L. yelled for defendant to let her go and struggled to get away defendant grabbed her breast and buttocks, pulled at her clothing and kissed her on the neck. During the attack defendant pulled hard enough to tear L.'s bra and squeezed her breasts hard enough to cause L. to feel pain. As she struggled to get free L. ended up face-to-face with defendant. He was rubbing himself against her and she could feel that defendant had an erection. L. finally pushed defendant away and ran for help. 11/1/11 RP 27-36, 38-39, 69.

L. ran outside yelling for help. Defendant left the store and ran away. Wood remained in the store. A regular customer arrived at the store and helped L. call the police. L. noticed that defendant

acted intoxicated and estimated that the attack lasted a couple minutes. Wood was still in the store when the police arrived and told the police where defendant lived. When the police brought defendant back to the store he was not wearing the hat or jacket and had shaved and combed his hair. Sergeant Johnson noticed an odor of intoxicants coming from defendant. 11/1/11 RP 39-43, 45, 51-53, 59-60, 93, 107, 109, 112-113.

#### **B. PROCEDURAL FACTS.**

On April 8, 2011, defendant was charged with Indecent Liberties by Forcible Compulsion. CP 314-315. Prior to trial defendant filed a motion for new counsel. CP 308-310.

At the July 22, 2011 hearing, the court heard defendant's concerns regarding his attorney. Defendant felt that counsel was not adequately investigating his case and that she was telling him to accept the offered deal. His concerns related to tactics, strategy and his lost confidence in his attorney. It was apparent that defendant understood the charge against him, the consequences of conviction and that he was willing to assist in preparing his defense. CP 308-310; 7/22/11 RP 3-4, 9.

Defendant's attorney responded that she had done substantial investigation and felt competent to handle defendant's

case, but that there had been a breakdown in communication between the two of them. Counsel was willing to continue representing defendant, but he was unwilling to talk to her. Defendant stated that while he had a lot of communication problems he never refused to speak with his attorney. Counsel stated she was willing to try to reestablish communication with defendant. The court found the breakdown in communication was caused by defendant refusing to speak with his attorney and that defendant had not shown good cause to replace his counsel. The court continued the hearing one week. 7/22/11 RP 5-6, 8, 10-12.

At the July 29, 2011 hearing, defendant acknowledged that he was speaking with his attorney. The court found that defendant was communicating with his counsel, that the difference in trial tactic was not sufficient reason to substitute counsel and denied the motion. 7/29/11 RP 2-5.

Prior to trial the prosecutor received information that defendant had made threatening statements directed at his attorney.<sup>3</sup> Defendant's attorney was provided copies of the reports

---

<sup>3</sup> In addition to threats directed at his attorney there were allegations that defendant made threats to blow up government buildings, kill various people including the President, and claims that he would act crazy so the court would think he was loony and he could get away with what he did. CP 305; 11/211 RP 21.

and witness statements regarding the alleged threats and indicated that she did not intend to withdraw as counsel. The prosecutor felt obligated to bring the matter to the court's attention. CP 304-307; 8/25/11 RP 2-4.

At the August 25, 2011 hearing, counsel stated that she was not afraid of defendant, that she was confident in her ability to represent him, and that she was prepared for trial and had been preparing all along. Defendant did not interpose any objection or argument regarding the concern that his attorney had a conflict of interest nor did he ask the court to appoint a different attorney at the hearing. The court found nothing had been presented contrary to counsel's belief that she could adequately represent defendant. 8/25/11 RP 3-4.

On October 31, 2001, during motions in limine, the court inquired about the prior motion dealing with potential conflict of interest. Defendant's attorney reiterated that she did not want to be taken off the case, that she did not fear defendant, and that she was prepared and could proceed effectively on his behalf. Defendant did not say anything about the potential conflict of

interest. Defendant gave his approval to proceed to trial with his current attorney. 10/31/11 RP 7-9.

At the conclusion of trial defendant was found guilty of Indecent Liberties by Forcible Compulsion. Defendant had an offender score of 5 and a standard range of 77 to 102 months. The maximum sentence for the offense is life. The court sentenced defendant to a maximum sentence of life imprisonment and a minimum sentence of 102 months. The court imposed twenty-one conditions of community custody. CP 23, 25, 33-35, 255-263, 278; 11/2/11 RP 60-61; 12/5/11 RP 3, 10-13.

### **III. ARGUMENT**

#### **A. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR SUBSTITUTION OF COUNSEL.**

Defendant claims that the trial court improperly denied his motion for substitution of counsel. Appellant's Brief 17-26.

The essential aim of the Sixth Amendment is "to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). A defendant does not have an absolute Sixth Amendment right to counsel of his choice. State v. DeWeese, 117 Wn.2d 369, 375-376, 816 P.2d 1

(1991), State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). The trial court has discretion to determine whether a defendant's dissatisfaction with counsel has merit and justifies appointment of new counsel. DeWeese, 117 Wn.2d at 376. A trial court's decision to deny a motion to substitute counsel is reviewed for abuse of discretion. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). "An abuse of discretion exists when no reasonable person would take the position adopted by the trial court." State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) review denied, 120 Wn.2d 1022, 844 P.2d 1018 (1993); Stenson, 132 Wn.2d at 701.

A defendant seeking to substitute counsel "must show good cause ... such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication." In re Personal Restraint of Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). Where an initial showing of good cause is made, the court will engage in a three-part inquiry to determine whether a motion for the appointment of substitute counsel was properly denied. The court examines: (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion. In re Stenson, 142

Wn.2d at 723-24, citing United States v. Moore, 159 F.3d 1154, 1158 n. 3 (9th Cir.1998).

**1. Defendant' Motion For Substitution Of Counsel.**

Here, defendant failed to show anything approximating a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. At the court's inquiry defendant aired his concerns regarding his attorney. Defendant's concerns related primarily to tactics, strategy and his lost confidence in his attorney. 7/22/11 RP 3-4, 8; 7/29-11 RP 3. Counsel has wide latitude to control strategy and tactics. In re Stenson, 142 Wn.2d at 733. A defendant's loss of confidence or trust in a court-appointed attorney is not a sufficient reason to substitute counsel. Varga, 151 Wn.2d at 200. The court found that defendant had not shown good cause to replace his counsel. 7/22/11 RP 11.

At the hearing defendant's attorney stated that difficulties in communication were the result of defendant's refusal to speak with her. Defendant acknowledged that he gave up talking. 7/22/11 RP 5-6, 8, 10. The court continued the hearing for a week and instructed defendant and his attorney to work on their communication. 7/22/11 RP 10-11. After a week of working on re-establishing communication defendant acknowledged that he was

speaking with his attorney. 7/29/11 RP 2, 5. The record demonstrates that defendant and his attorney were able to communicate and effectively represent him at trial. "Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." Stenson, 132 Wn.2d at 734. The trial court correctly found that defendant did not show good cause to warrant substitution of counsel in any of his complaints about his attorney. Varga, 151 Wn.2d at 200-201, Stenson, 132 Wn.2d at 737.

Defendant argues that the trial court improperly focused on the attorney's competence. Appellant's Brief 23-25. The court's inquiry and comments were in response to defendant's expressed concern about the quality of the representation. Determining "the breakdown's effect on the representation the client actually receives" is part of the inquiry the court should make. In re Stenson, 142 Wn.2d at 724. The trial court made a careful evaluation of the reasons for defendant's motion.

In a case such as this, where there is no cause shown that could ever warrant the substitution of counsel, it is unnecessary for the trial court to engage in a futile inquiry or for the reviewing court to conduct a rote application of an otherwise pointless test. See

Varga, 151 Wn.2d at 200-201. The record does not establish that defendant's continued representation by his attorney even remotely infringed upon his Sixth Amendment rights. The trial court properly denied defendant's motion to substitute counsel.

## **2. Prosecutor's Motion To Clarify Whether A Conflict Existed.**

Prior to trial the prosecutor received information that defendant had made threatening statements directed at his attorney. Defendant's attorney was provided copies of the reports and witness statements regarding the alleged threats and indicated that she did not intend to withdraw as counsel. The prosecutor felt obligated to bring the matter to the court's attention. CP 304-307; 8/25/11 RP 2-4.

The Sixth Amendment right to effective assistance of counsel at trial includes the entitlement to representation that is free from conflicts of interest. State v. Regan, 143 Wn. App. 419, 425, 177 P.3d 783 review denied, 165 Wn.2d 1012 (2008) citing Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). The trial court has a duty to investigate potential attorney-client conflicts of interest if it knows or reasonably should know that a potential conflict exists. Regan, 143 Wn. App. at 425-

426, citing Mickens v. Taylor, 535 U.S. 162, 167–172, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002).

Where, as here, a defendant fails to make a timely objection as to his attorney's potential conflict of interest, his conviction will stand unless he establishes that an actual conflict of interest adversely affected his lawyer's performance. Dhaliwal, 150 Wn.2d at 571; Regan, 143 Wn. App. at 427, citing Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). An “actual conflict” is “a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties.” Regan, 143 Wn. App. at 427–428, citing Mickens v. Taylor, 535 U.S. 162, 171, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); United States v. Baker, 256 F.3d 855, 860 (9th Cir.2001). To show an adverse effect, a defendant must demonstrate that a plausible alternative defense strategy was available but was not pursued because of a conflict with the attorney's other interests. Regan, 143 Wn. App. at 428. The appellate court reviews whether circumstances demonstrate a conflict of interest de novo. State v. Vicuna, 119 Wn. App. 26, 30, 79 P.3d 1 (2003), review denied, 152 Wn.2d 1008 (2004).

In order to show adverse effect, therefore, defendant need demonstrate “that some plausible alternative defense strategy or

tactic might have been pursued' but was not and that 'the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.'" Regan, 143 Wn. App. at 428, quoting United States v. Stantini, 85 F.3d 9, 16 (2d Cir.1996).

The record does not support defendant's claim of an actual conflict of interest that adversely affected the attorney's performance. The attorney plainly stated that she was not afraid of defendant, that she was confident in her ability to represent defendant, and that she was prepared for trial and had been preparing all along. 8/25/11 RP 3. Defendant did not ask the court to appoint a different attorney at the hearing regarding the prosecutor's motion to clarify whether there was a conflict.

During motions in limine the court asked about the prior motion dealing with potential conflict of interest. Defendant's attorney reiterated that she did not want to be taken off the case, that she did not fear defendant, and that she was prepared and could proceed effectively on his behalf. Defendant did not interpose any objection or argument regarding concerns that his attorney had a conflict of interest. To the contrary, defendant expressed confidence in his attorney and gave his approval to

proceed to trial with his assigned counsel. 10/31/11 RP 7-9. A conscious decision not to raise an issue at trial effectively serves as an affirmative waiver, different in form but not in substance from an express affirmative waiver. State v. Walton, 76 Wn. App. 364, 370, 884 P.2d 1348, 1352 (1994); State v. Valladares, 99 Wn.2d 663, 671-672, 664 P.2d 508, 513 (1983) (defendant waived or abandoned his constitutional rights by affirmatively withdrawing his pretrial motion).

Defendant has not demonstrated any lapse in representation contrary to his interests nor any specific instance where a purported conflict affected his attorney's advocacy on his behalf. Because defendant fails to show that his trial counsel's loyalties had any adverse effect on his representation, he has not established an actual conflict of interest. Defendant was not deprived of his Sixth Amendment right to effective counsel.

**B. THE COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING AS A THRESHOLD QUESTION THAT THERE WAS NO REASON TO DOUBT DEFENDANT'S COMPETENCY.**

Defendant claims that he was denied a fair trial because the trial court failed to order a competency hearing. Appellant's Brief 27-31.

It is fundamental that an incompetent person may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues. RCW 10.77.050; City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741, 743 (1985) review denied, 103 Wn.2d 1031 (1985). “‘Incompetency’ means a person lacks the capacity to understand the nature of the proceedings against him or to assist in his own defense as a result of mental disease or defect.” RCW 10.77.010(6).

Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

RCW 10.77.060(1). Once there is a reason to doubt a defendant's competency, the court must follow the statute to determine the defendant's competency to stand trial. Gordon, 39 Wn. App. at 441. The procedures of the statute are mandatory and not merely directory. State v. Wicklund, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982); Gordon, 39 Wn. App. at 441.

There is, however, a distinction between the determination of a reason to doubt competency and an actual determination of

competency. Gordon, 39 Wn. App. at 441. Before a determination of competency is required by RCW 10.77.060, the court must make the threshold determination that there is a reason to doubt competency. In exercising its discretion in determining the threshold question, the court should give considerable weight to the attorney's opinion regarding a client's competency and ability to assist in the defense. Gordon, 39 Wn. App. at 441-42; State v. Crenshaw, 27 Wn. App. 326, 331, 617 P.2d 1041 (1980). Defense counsel must request a competency determination if she has reason to doubt the defendant's competency. Gordon, 39 Wn. App. at 441. That doubt arises if counsel has reason to question whether the defendant: (1) understands the charge and consequences of conviction; (2) understands the facts giving rise to the charge; and (3) is able to relate the facts to his attorney to help prepare the defense. RCW 10.77.010(6); Gordon, 39 Wn. App. at 442. A motion to determine competency must be supported by a factual basis. Gordon, 39 Wn. App. at 441-442.

The attorney representing defendant in this case did not file a motion concerning defendant's competence. Over seven months had passed between the arrest and trial. The attorney had conferred with defendant and made appearances before the court

many times in the case. During that period counsel did not raise any concern regarding defendant's competency. It was reasonably for the trial court to consider the lack of counsel's concern regarding defendant's competency. Gordon, 39 Wn. App. at 441-442. In addition, when defendant addressed the court, it was apparent that he understood the charge against him, the factual basis for the charge, the consequences of a conviction, and that he was willing to assist in preparing his defense. 7/22/11 RP 2-5; 7/29/11 RP 4. Neither the prosecutor, nor defendant's attorney, nor the several judges who defendant appeared before raised any concerns about defendant's competency.

Defendant argues that his statement that he had mental health history and the allegations that he made threats to blow up government buildings and kill the President suggested that he was incompetent. Appellant's Brief 29-31. However, the statement and the allegations were unsupported by sufficient facts to cause a reason to doubt defendant's competency. CP 304-307; 7/22/11 RP 3; 8/25/11 RP 2. A court is not obliged to determine a defendant's competency when there is no factual basis for doubting it in the first place. State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992);

Gordon, 39 Wn. App. at 441. The mere statement that a person has a mental health history or allegations that the person made threats does not create a reason to doubt the person's competency. The trial court did not abuse its discretion in determining the threshold question that there was no reason to doubt defendant's competency.

**C. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND THE ELEMENT OF FORCIBLE COMPULSION BEYOND A REASONABLE DOUBT.**

Defendant argues the evidence was insufficient to support his convictions for indecent liberties; specifically that the evidence was insufficient to show that he used force to overcome resistance. Appellant's Brief 31-38.

**1. Legal Standards.**

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006); State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) ("In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence."). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Galisa, 63 Wn. App. 833, 838, 822 P.2d 303 (1992), citing State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered); State v. Jackson, 62 Wn. App. 53, 58 n. 2, 813 P.2d 156 (1991) (defense evidentiary

inference cannot be used to attack sufficiency of evidence to convict).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight and persuasiveness of the evidence. State v. Delmarter, 94 Wn.2d at 638. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992). In the present case, the jury found the victim's testimony credible.

## **2. Indecent Liberties.**

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

(a) By forcible compulsion;

\*\*\*

(2)(b) Indecent liberties by forcible compulsion is a class A felony.

RCW 9A.44.100; see CP 314-315 (Information); 287 (Jury Instruction 6, WPIC 49.02).

### 3. Definition Of Forcible Compulsion.

(6) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

RCW 9A.44.010(6); See also CP 291 (Jury Instruction 10, WPIC 45.03). "Forcible compulsion is not the force inherent in any act of sexual touching, but rather is that 'used or threatened to overcome or prevent resistance by the female.'" State v. Ritola, 63 Wn. App. 252, 254-255, 817 P.2d 1390, 1391-1392 (1991), citing State v. McKnight, 54 Wn. App. 521, 527, 774 P.2d 532 (1989). Whether the evidence establishes the element of resistance is a fact sensitive determination based on the totality of the circumstances, including the victim's words and conduct. McKnight, 54 Wn. App. at 526.

The evidence presented in the present case showed that on March 13, 2011, while L. was working at a store in Monroe, WA, defendant grabbed L. from behind and pulled her up against him. She did not know defendant and had never seen him before. While L. yelled and struggled to get away defendant grabbed her breast and buttocks, pulled at her clothing and kissed her on the neck. During the attack defendant tore L.'s bra. As she struggled L. and

defendant ended up face-to-face. Defendant was rubbing himself against L. and she could feel that he had an erection. L. finally pushed defendant away and ran for help. Defendant then left the store and ran away. 11/1/11 RP 18-20, 29-36, 38-40, 45-46.

Viewed in the light most favorable to the State, the foregoing evidence was sufficient to permit any rational trier of fact to find beyond a reasonable doubt that on the 13<sup>th</sup> day of March, 2011, defendant knowingly caused L., who was not his spouse, to have sexual contact with defendant by forcible compulsion. The evidence was sufficient to support the jury's verdict. Accordingly, defendant's conviction for indecent liberties should be affirmed.

**D. DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH THAT THE PROSECUTOR'S CONDUCT WAS IMPROPER OR PREJUDICIAL AND THAT ANY PREJUDICIAL EFFECT HAD A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE VERDICT AND WAS NOT CURED BY THE COURT'S INSTRUCTIONS.**

Defendant alleges that the prosecutor committed flagrant misconduct by using inflammatory argument and arguing facts not in evidence during closing argument. Appellant's Brief 38-43. The prosecutor did not argue *facts not in evidence*. Rather, the prosecutor argued that the evidence did not support charges of rape or an assault with serious injury, but that the facts did support the charge of indecent liberties. 11/2/11 RP 36-48. Counsel may

use dramatic rhetoric in arguing inferences supported by the evidence. State v. Brown, 132 Wn.2d 529, 568-569, 940 P.2d 546 (1997).

In a challenge to a prosecutor's statement during closing argument, the defendant bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 278 P.3d 653, 662 (2012); State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995) (reversal is not required if the error could have been obviated by a curative instruction which the defense did not request).

Defendant did not object to the prosecutor's closing argument. Where there is no objection to alleged misconduct during trial, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 278 P.3d at 664, citing Stenson, 132 Wn.2d at 727; State v. Brown, 132 Wn.2d at 561; State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The absence of an objection "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the

context of the trial." Swan, 114 Wn.2d at 661. The prosecutor's statements in the present case are not the type of comments which courts have held to be inflammatory. Emery, 278 P.3d at 665. The prosecutor's statement that L. "got away and that it wasn't actually worse than it was" supported the prosecutor's argument that L.'s struggle to get away demonstrated that force was used to overcome her resistance. 11/2/11 RP 40. Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether any resulting prejudice could have been cured. Emery, 278 P.3d at 665.

The standard of review is based on a defendant's duty to object to a prosecutor's allegedly improper argument. Emery, 278 P.3d at 664. "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." Emery, 278 P.3d at 664-665, citing State v. Weber, 159 Wn.2d 252, 271-272, 149 P.3d 646 (2006) (were a party not required to object, a party could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal); State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (counsel may not remain silent, speculating upon a favorable verdict, and then,

when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal). “An objection is unnecessary in cases of incurable prejudice only because “there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” Emery, 278 P.3d at 664-665, quoting State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956).

Under the heightened standard where there was no objection at trial, the defendant must show that (1) “no curative instruction would have obviated any prejudicial effect on the jury” and (2) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict.” Emery, 278 P.3d at 664, citing State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). The reviewing court’s focus is on whether any resulting prejudice could have been cured. While defendant may be able to demonstrate that the prosecutor’s statements were improper, he has not shown that they were incurable or prejudicial. At most the prosecutor’s statements would have been confusing to the jury. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” Emery, 278 P.3d at 665, quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464

(1932). Defendant has failed to show that the prosecutor's comments engendered an incurable feeling of prejudice in the mind of the jury.

In analyzing prejudice, courts do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Emery, 278 P.3d at 666 n.13; State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Moreover, closing argument is, after all, *argument*. In that context, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Stenson, 132 Wn.2d at 727; State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983) (counsel has latitude in closing argument to draw and express reasonable inferences from the evidence). If impropriety is present, reversal is required only if a substantial likelihood exists that the misconduct affected the jury's verdict, thereby depriving the defendant of a fair trial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). A prosecutor's conduct is prejudicial only if there is a substantial likelihood the misconduct affected the jury's verdict.

Finch, 137 Wn.2d at 839; Evans, 96 Wn.2d at 5. The court must consider what would likely have happened if defendant had timely objected. Emery, 278 P.3d at 665. Here, any prejudice from the prosecutor's statements could have been cured by a proper instruction if defendant had objected at trial.

The statements and remarks by counsel are not evidence and should not be so considered. State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993); State v. Huber, 129 Wn. App. 499, 504, 119 P.3d 388 (2005). The court may mitigate potential prejudice by so instructing the jury. State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991). In the present case the trial court did instruct the jury that the prosecutor's statement was argument, not evidence, and that the jury "must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 281 (Jury Instruction 1, WPIC 1.02). Further the jury was instructed: "You must not let your emotions overcome you rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference." CP 282 (Jury Instruction 1,

WPIC 1.02). The jury is presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

In the present case the court's instructions eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor's remarks. Defendant has failed to show that the prosecutor's comments engendered an incurable feeling of prejudice that affected the jury's verdict. Any potential prejudice from the prosecutor's statements was obviated by the court's instruction to the jury.

**E. INDETERMINATE SENTENCING SUBJECTING DEFENDANT TO LIFETIME SUPERVISION AS A NON PERSISTENT SEX OFFENDER IS CONSTITUTIONAL.**

Defendant argues that his indeterminate sentence subjecting him to lifetime supervision by the Department of Corrections is unconstitutional. Appellant's Brief 44-62.

Defendant was convicted of indecent liberties by forcible compulsion. An offender convicted of indecent liberties by forcible compulsion must receive an indeterminate sentence. RCW 9A.507(1)(a)(i). The maximum sentence for indecent liberties by forcible compulsion is life imprisonment. RCW 9A.20.021(1)(a); RCW 9A.44.100(2)(b). Defendant's standard range sentence is 77 to 102 months. CP 263. The sentencing court imposed a

maximum sentence of life imprisonment and a minimum sentence of 102 months. CP 23; 12/5/11 RP 10-13.

RCW 9.94A.507 establishes the sentencing regime for nonpersistent offenders convicted of specified sex crimes, including indecent liberties by forcible compulsion. RCW 9.94A.507(3) directs the sentencing judge to impose both a maximum term and a minimum term. The maximum term “consist[s] of the statutory maximum sentence for the offense,” which for the class A felony of indecent liberties by forcible compulsion, is a term of life imprisonment. RCW 9.94A.507(3); RCW 9A.20.021(1)(a). The statutory maximum identified in RCW 9.94A.507(3) differs from other statutory maximums because it is mandatory, whereas most statutory maximums merely establish the outside limit of available sentences. State v. Clarke, 156 Wn. 2d 880, 887-888, 134 P.3d 188, 191 (2006); See RCW 9A.20.021.

A sentence violates the Washington Constitution if it is grossly disproportionate to the crime for which it was imposed. State v. Flores, 114 Wn. App. 218, 223, 56 P.3d 622, 624 (2002); State v. Morin, 100 Wn. App. 25, 29, 995 P.2d 113, review denied, 142 Wn.2d 1010, 16 P.3d 1264 (2000). In Fain, the Supreme Court set out four factors to consider in determining whether a sentence

is grossly disproportionate: “(1) the nature of the offense; (2) the legislative purpose behind the habitual criminal statute<sup>4</sup>; (3) the punishment defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction.” State v. Fain, 94 Wn.2d 387, 397, 617 P.2d 720 (1980).

Under the first factor, the court considers whether the crime is violent and whether it was committed against a person or property. State v. Gimarelli, 105 Wn. App. 370, 381, 20 P.3d 430 (2001). Defendant contends that his crime was relatively innocuous and less serious than other violent offenses. Appellant’s Brief at 46-48. But indecent liberties is a most serious offense, RCW 9.94A.030(32)(h), and is considered a sexually violent offense for purposes of the Sexually Violent Predator Act. RCW 71.09.020(17). It is committed against a person. Defendant physically touched and rubbed L. He grabbed her from behind and pulled her up against him. L. could feel that defendant had an erection when he rubbed himself against her. While L. yelled and struggled to get away defendant squeezed her breast and buttocks,

---

<sup>4</sup> RCW 9.94A.507 addresses sentencing of non persistent offenders convicted of specified sex crimes; it is not a habitual criminal statute.

kissed her on the neck and pulled at her clothing tearing L.'s bra. 11/1/11 RP 18-20, 29-36, 38-40, 45-46. Here, as in Gimarelli and Morin, this factor favors the sentence's constitutionality. In Gimarelli, the defendant repeatedly touched the victim on her abdomen, over her protests. Gimarelli, 105 Wn. App. at 381. In Morin, the defendant put his hands down the victim's pants and covered her mouth when she screamed. Morin, 100 Wn. App. at 27. Conversely, in Fain, where the court found the sentence unconstitutional, the defendant committed theft of about \$400. Fain, 94 Wn.2d at 389.

Under the second factor, the legislative history indicates that RCW 9.94A.507 contemplates a system of indeterminate sentencing. In 2001, the legislature redesigned the determinate sentencing regime for certain sex offenders by enacting RCW 9.94A.712 (recodified as RCW 9.94A.507), which was part of an act concerned with the management of sex offenders in the community. LAWS OF 2001, 2d Spec. Sess., ch. 12, § 303. Some of the stated reasons for enacting the sex offender management act were concerns related to determinate sentencing, including that it "does not allow the state to return a person under supervision in the community to prison beyond the end of his or her defined term."

2001 FINAL LEGISLATIVE REPORT, 57th Wash. Leg., at 233. As a result, the enactment of RCW 9.94A.712 indicates the legislature's desire to move away from determinate sentencing of sex offenders. Clarke, 156 Wn.2d at 888-889.

Under the third factor, although courts have noted that Washington's two strikes law is among the most stringent sentencing laws in the country, Morin, 100 Wn. App. at 32-33, several other states join Washington in imposing a life sentence on a person who has twice been convicted of sex offenses.<sup>5</sup> Additionally, this factor alone is not dispositive. Flores, 114 Wn. App. at 224; Gimarelli, 105 Wn. App. at 382.

Under the fourth factor, indecent liberties by forcible compulsion is a Class A felony and a most serious sex offense. RCW 9A.44.100; 9.94A.030(32). Other most serious violent sex offenses would also qualify an offender for a maximum term of life. Gimarelli, 105 Wn. App. at 382. Defendant argues that if he had molested or assaulted children or his crime had caused death, he

---

<sup>5</sup> Ga.Code Ann. § 17-10-7(b)(2) (1997) (second offense of aggravated child molestation leads to life sentence without parole); S.C.Code Ann. § 17-25-45(a) (1985 and Supp.2001) (second offense of criminal sexual conduct with minor leads to life sentence without parole); N.M. Stat. Ann. § 31-18-25 (2002) (second offense of violent sexual offense, when victim is under 13 years old, leads to life sentence without parole); Mont.Code Ann. § 46-18-219(1)(a) (2001) (second offense of sexual abuse of children leads to life sentence).

would be facing a more lenient sentence. Appellant's Brief 57-58. But in analyzing this factor in a three-strikes case, the Supreme Court compared the sentence in question to the sentence imposed for other three-strikes crimes. State v. Rivers, 129 Wn.2d 697, 714-715, 921 P.2d 495 (1996). It noted that "all defendants who are convicted of a third 'most serious offense' receive sentences of life imprisonment without possibility of parole." Rivers, 129 Wn.2d at 714. Similarly, courts must sentence all nonpersistent offenders convicted of indecent liberties by forcible compulsion to a maximum term of life. RCW 9.94A.507. Defendant's sentence is comparable to the sentence any nonpersistent offender would have received for committing a similar offense. Flores, 114 Wn. App. at 224-25.

Based on these factors, defendant's sentence is not grossly disproportionate to his crime. He was convicted of indecent liberties by forcible compulsion. The sentence fulfills the legislature's intended purpose and does not violate Washington's prohibition of cruel punishment.

**F. SEVEN OF THE CONDITIONS OF COMMUNITY CUSTODY WERE IMPROPER OR NOT CRIME RELATED AND THOSE CONDITIONS SHOULD BE REMANDED FOR RESENTENCING.**

The sentencing court imposed twenty-one conditions of community custody. CP 25, 33-35. Defendant argues that the

court lacked authority to impose seven of the conditions. Appellant's Brief 62-66. The State concedes that the court's imposition of conditions 8, 10, 15, 16, 17, 23 and 24 was error.

A defendant may raise objections to community custody conditions for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204 n. 9, 76 P.3d 258 (2003). The court may impose and enforce crime-related prohibitions and affirmative conditions as a part of any sentence. RCW 9.94A.505(8). Conditions of community custody may include "crime-related treatment or counseling services," participation in "rehabilitative programs," and compliance with "crime-related prohibitions." RCW 9.94A.703(3)(c), (d), (f). A "crime-related prohibition" is defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). The court reviews conditions of community custody for abuse of discretion. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

#### **1. Condition 8.**

In State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2010), the Court held that the same language was unconstitutionally vague. Bahl, 164 Wn.2d at 761. Accordingly, the State asks this court to

reverse community custody condition 8 of defendant's sentence and remand for resentencing in accord with State v. Bahl.

**2. Condition 10.**

Defendant's crime did not involve children, nor was there any relationship between the circumstances of the crime and children. Further, the trial court actually struck proposed conditions 4, 5, 6, 9 and 11 dealing with children. The State asks this court to reverse community custody condition 10 of defendant's sentence and remand for resentencing.

**3. Conditions 15, 16 And 17.**

There was no direct relationship between the circumstances of the crime and defendant's use of illegal drugs. Therefore, the court lacked authority to impose conditions 15, 16 and 17. Accordingly, the State asks this court to reverse community custody conditions 15, 16 and 17 of defendant's sentence and remand for resentencing.

**4. Conditions 23 And 24.**

The crime did not involve computers nor was there any relationship between the circumstances of the crime and defendant's use of computers. The court, therefore, lacked authority to impose conditions 23 and 24. The trial court actually

struck conditions 20, 21, and 22 dealing with access to the internet, use of chat rooms and using false identities on computers. Accordingly, the State asks this court to reverse community custody conditions 23 and 24 of defendant's sentence and remand for resentencing.

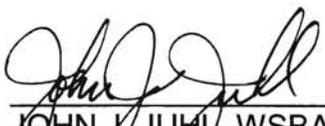
#### **IV. CONCLUSION**

For the reasons stated above, the conviction should be affirmed; portion of defendant's sentence addressing the community custody conditions 8, 10, 15, 16, 17, 23, and 24 should be reversed and remand for resentencing.

Respectfully submitted on August 30, 2012.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:

  
\_\_\_\_\_  
JOHN J. JUHL, WSBA #18951  
Deputy Prosecuting Attorney  
Attorney for Respondent